

### **REMARKS**

This is a full and timely response to the outstanding final Office Action mailed February 10, 2006. Upon entry of the amendments in this response, claims 2 – 6 and 10 - 17 remain pending. In particular, Applicant has added dependent claims 16 and 17, has amended claims 2, 4 – 6 and 14, and has canceled claims 1 and 7 - 9 without prejudice, waiver, or disclaimer. Applicant has canceled claims 1 and 7 - 9 merely to reduce the number of disputed issues and to facilitate early allowance and issuance of other claims in the present application. Applicant reserves the right to pursue the subject matter of these canceled claims in a continuing application, if Applicant so chooses, and does not intend to dedicate the canceled subject matter to the public. Reconsideration and allowance of the application and presently pending claims are respectfully requested.

### **Claim Objections**

The Office Action indicates that the claims are objected to because of various informalities. As set forth above, Applicant has amended the claims and respectfully asserts that the objections have been accommodated.

### **Rejections Under 35 U.S.C. §112**

The Office Action indicates that claims 2 and 9 stand objected under 35 U.S.C. §112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. As set forth above, Applicant has amended claim 2 and respectfully asserts that the rejection as to claim 2 has been accommodated.

With respect to claim 9, Applicant has canceled that claim and respectfully asserts, therefore, that the rejection of claim 9 has been rendered moot.

### **Rejections Under 35 U.S.C. §102**

The Office Action indicates that claims 1 – 3, 6 and 9 stand rejected under 35 U.S.C. §102(b) as being anticipated by *Brown*. As set forth above, Applicant has canceled claims 1 and 9 and respectfully asserts, therefore, that the rejections of claims 1 and 9 have been rendered moot. With respect to claims 2, 3 and 6, Applicant respectfully traverses.

In this regard, the Office Action indicates that *Brown* teaches primary members that are hinged together. However, *Brown* clearly teaches that the distractor arms 34a and 34b are hinged to frame 28 by fixed pivots 30 such that the arms are permanently separated at the pivot points. This is in direct contrast to the limitations recited in Applicant's claims.

Notably, claim 2 recites:

2. An interdiscal tensiometer, comprising:  
*a pair of primary members being hingedly fixed together*, each member of said pair of primary members having a contact tine;  
a tension measuring device for measuring load of said contact tines;  
a distance measuring device for measuring distance between said contact tines;  
wherein said contact tines are adapted to engage a pair of intervertebral bodies such that said tension measuring device can measure a load therein and said distance measuring device can measure a distance therebetween.  
(Emphasis added).

Applicant respectfully asserts that *Brown* is legally deficient for the purpose of anticipating claim 2. In particular, *Brown* does not teach or otherwise disclose at least the features/limitations emphasized above in claim 2. Notably, the Office Action appears to indicate

that the device of *Brown* incorporates components that are hingedly fixed together. However, as noted above, the relevant components of *Brown* are hingedly fixed apart, not together.

Therefore, Applicant respectfully asserts that claim 2 is in condition for allowance.

Since claims 6 and 16 are dependent claims that incorporate all the features/limitations of claim 2, and are not otherwise rejected in the Action, Applicant respectfully asserts that these claims also are in condition for allowance. Additionally, these claims recite other features/limitations that can serve as an independent basis for patentability.

In this regard, claim 16 recites:

16. The interdiscal tensiometer of claim 2, wherein *the primary members are hingedly fixed together in a cross-over arrangement such that the primary members cross over each other at a location at which the primary members are hingedly fixed.*

(Emphasis added).

Applicant respectfully asserts that this claim clearly is in condition for allowance as the relevant components of *Brown* extend separately from their respective pivot points and do not cross over each other. Notably, no new matter has been added by the addition of claim 16.

With respect to claim 3, that claim recites:

3. A method of using an interdiscal tensiometer, comprising the steps of:  
*providing a pair of primary members being hingedly fixed together, each member of said pair of primary members having a contact tine; inserting each of said contact tines between at least two vertebral bodies; measuring a load between said at least two vertebral bodies; and measuring a distance between said at least two vertebral bodies.*

(Emphasis added).

Applicant respectfully asserts that *Brown* is legally deficient for the purpose of anticipating claim 3. In particular, *Brown* does not teach or otherwise disclose at least the

features/limitations emphasized above in claim 3. Notably, the Office Action appears to indicate that the device of *Brown* incorporates components that are hingedly fixed together. However, as noted above, the relevant components of *Brown* are hingedly fixed apart, not together.

Therefore, Applicant respectfully asserts that claim 3 is in condition for allowance.

Since claim 17 is a dependent claim that incorporates all the features/limitations of claim 3, and is not otherwise rejected in the Action, Applicant respectfully asserts that this claim also is in condition for allowance. Additionally, this claims recites other features/limitations that can serve as an independent basis for patentability.

In this regard, claim 17 recites:

17. The method of using an interdiscal tensiometer of claim 3, wherein *the primary members are hingedly fixed together in a cross-over arrangement such that the primary members cross over each other at a location at which the primary members are hingedly fixed.*

(Emphasis added).

Applicant respectfully asserts that this claim clearly is in condition for allowance as the relevant components of *Brown* extend separately from their respective pivot points and do not cross over each other. Notably, no new matter has been added by the addition of claim 17.

### **Rejections Under 35 U.S.C. §103**

The Office Action indicates that claims 4 and 7 stand rejected under 35 U.S.C. 103(a) as being unpatentable over *Brown* in view of *Nicholas*. The Office Action also indicates that claims 10 - 15 are rejected under 35 U.S.C. 103(a) as being unpatentable over *Brown* in view of *Frey*. The Office Action also indicates that claims 5 and 8 are rejected under 35 U.S.C. 103(a) as being unpatentable over *Brown* in view of *Howell*. With respect to claims 7 and 8, Applicant has

canceled these claims and respectfully asserts, therefore, that the rejections of claims 7 and 8 have been rendered moot. With respect to claims 4, 5 and 10 - 15, Applicant respectfully traverses.

In this regard, Applicant respectfully asserts that the asserted combinations of references are legally deficient for the purpose of remedying the deficiencies noted above with respect to *Brown*. Therefore, since the asserted combinations do not teach or reasonably suggest all of the limitations recited in independent claims 2 and 3, as set forth above, Applicant respectfully asserts that dependent claims 4 and 5, which incorporate the limitations of claim 2, and 10 – 15, which incorporate the limitations of claim 3, are in condition for allowance.

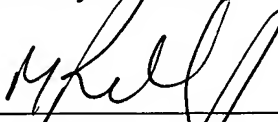
#### **Newly Added Claims**

In this response Applicant has added new claims 16 and 17, each of which further defines the primary members as being “hingedly fixed together in a cross-over arrangement.” No new matter has been added (see, for example, FIGs. 1 and 2 and the accompanying description at page 4. Since none of the cited references, either individually or in combination, teaches or otherwise discloses at least this feature, Applicant respectfully asserts that these claims are in condition for allowance.

**CONCLUSION**

In light of the foregoing amendments and for at least the reasons set forth above, Applicant respectfully submits that all objections and/or rejections have been traversed, rendered moot, and/or accommodated, and that the pending claims are in condition for allowance. Favorable reconsideration and allowance of the present application and all pending claims are hereby courteously requested. If, in the opinion of the Examiner, a telephonic conference would expedite the examination of this matter, the Examiner is invited to call the undersigned agent at (770) 933-9500.

Respectfully submitted,



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